UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD PACKAGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

and

Case No. 03-CA-210207

GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M

RESPONDENT CASCADES CONTAINERBOARD PACAKGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Respondent Cascades Containerboard Packaging-Lancaster, A Division of Cascades New York, Inc. ("Cascades") submits this Answering Brief in response to the Counsel for the General Counsel's ("GC") Cross-Exceptions to the November 23, 2018 Decision of Administrative Law Judge Kimberly Sorg-Graves ("ALJ") and the GC's Brief in Support of its Cross-Exceptions to the Decision of the ALJ.

ARGUMENT

I. THE ALJ CORRECTLY DETERMINED THIS CASE NEITHER REQUIRES NOR WARRANTS A MAKE-WHOLE REMEDY BASED UPON A LACK OF EVIDENCE THAT EMPLOYEES NEEDED TO BE MADE WHOLE FOR LOSS OF BACKPAY OR OTHER BENEFITS

The ALJ properly concluded that "insufficient evidence of record [existed] to establish that an order to make employees whole for loss of backpay or other benefits is necessary to remedy the actions of Respondent." (ALJ 17:34-36). Further, the ALJ correctly found that beyond the lack of evidence suggesting the need for a make-whole remedy, the Complaint did not allege that any actions Cascades allegedly took (e.g., purported inconsistent application of overtime policies) "were unlawful unilateral changes in terms and conditions of employment that would warrant a make-whole remedy." (ALJ 17:39-40). Rather than grant an unnecessary make-whole remedy, the ALJ rationally determined that the alleged inconsistencies in the application of the collective bargaining agreement are appropriately addressed through the grievance/arbitration procedure. (ALJ 17:40-42). Consistent with the underlying tenets of the National Labor Relations Act (the "Act"), the ALJ concluded that employees should be returned to the position that they would have been in if an employer had not allegedly engaged in unfair labor practices. (ALJ 17:44-46). By requiring Cascades waive any procedural time limits to the

filing and/or the resumption of processing of any grievance that arose or was in any stage of the grievance/arbitration process at any time since August 25, 2017, the ALJ effectively returned the employees to the position in which they would have been. In furtherance of the ALJ's Decision, on October 5, 2018 Cascades participated in the single pending arbitration at issue with Local 503 (i.e., regarding the reclassification of four bargaining unit employees' job titles that resulted in their receipt of a reduced wage rate).[1] If Local 503 brings further arbitrations timely and pursuant to the terms of the collective bargaining agreement between Cascades and Local 27, Cascades anticipates participating in the arbitration, as required by the decision of U.S. District Court Judge Lawrence J. Vilardo.[2]

The ALJ's refusal to grant a make-whole remedy under the circumstances is entirely consistent with Board precedent. In *The House of The Good Samaritan d/b/a Samaritan Medical Center and Samaritan-Keep Nursing Home, Inc.*, 319 N.L.R.B. 392 (1995) the Board affirmed the Administrative Law Judge who held that "[s]ince the complaint does not allege any unilateral changes after the Respondents unlawful withdrawal of recognition, the issue was not litigated, and no unilateral change finding was made by me, I therefore provide no make-whole relief." *See also Davies Medical Center*, 303 NLRB 195 (1991). Similarly, here, the Complaint does not

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[1] Upon the receipt of full and final determination in the instant case, if Cascades is required to recognize Local 503 as the lawful bargaining representative of the former Local 27 unit members, it is prepared to pay any backpay owed to the four bargaining unit employees at issue.

[2] On March 23, 2018, Region 3 filed a Complaint in United States District Court for the Western District of New York, seeking injunctive relief pursuant to Section 10(j) of the Act, pending disposition of the instant unfair labor practice proceedings. Cascades opposed the request. On July 30, 2018, United States District Court Judge Lawrence J. Vilardo denied in part and granted in part Region 3's application for preliminary injunctive relief. Judge Vilardo denied all requested preliminary injunctive relief – only requiring Cascades to recognize Local 503 for the purpose of arbitrating grievances. The Order also required Cascades to continue honoring the 2016 – 2020 collective bargaining agreement and holding union dues in escrow pending a final resolution of the proceeding before the NLRB – both actions which Cascades voluntarily took at the outset of the question concerning representation, prior to any Court directive. *See Murphy v. Cascades Containerboard Packaging – Lancaster*, 18-cv-00375 (W.D.N.Y. July 30, 2018).

allege any unilateral changes to the terms and conditions of employment that occurred after the purported withdrawal of recognition.[3] The Board should deny the GC's Cross-Exceptions as the ALJ's rationale on this isolated issue is consistent with Board law.[4]

II. THE GC'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE ALJ'S DECISION FAILS TO IDENTIFY WITH ANY SPECIFICITY WHY A MAKE-WHOLE REMEDY IS REQUIRED; RATHER IT CITES INAPPOSITE BOARD CASE LAW WHERE MAKE-WHOLE REMEDIES WERE AWARDED UNDER DIFFERENT FACTS THAN THE INSTANT CASE

The GC's Brief relies on cases with underlying facts that differ starkly from the facts in the instant case. Here, Cascades continued to maintain the terms and conditions of the collective bargaining agreement and did not repudiate the agreement that exists with Local 27. The only exceptions were Cascades placed employees' dues monies in an interest-bearing escrow account and it refused to arbitrate grievances with Local 503. Cascades took these steps because of its position that Local 503 is not the lawful successor to Local 27 and does not represent the former Local 27 unit members. Thus, Local 503 does not have the right to avail itself of the bargained-for grievance/arbitration mechanism in the collective bargaining agreement between Local 27 and Cascades. Cascades has begun arbitrating grievances with Local 503 following the July 30, 2018 decision of U.S. District Court Judge Lawrence J. Vilardo in *Murphy v. Cascades Containerboard Packaging – Lancaster*, 18-cv-00375 (W.D.N.Y. July 30, 2018). There is no loss of backpay or other benefits to the bargaining unit employees that requires a make-whole

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[3] It remains the position of Cascades that at no time has it had an obligation to recognize or bargain with Local 503, so no "withdrawal of recognition" ever occurred.

[4] Cascades's position as set forth in its Brief in Support of its Exceptions and Reply Brief remains the same. The Board should reverse the ALJ's Decision and dismiss the Complaint in its entirety. If, however, the Board declines to grant the relief sought by Cascades, the Board should affirm the ALJ's determination that a make-whole remedy is inappropriate under the circumstances for the reasons stated herein.

remedy, and the cases relied upon by the GC do not present similar factual scenarios. Specifically:

- In *B-Y Mfg., Inc.*, 166 NLRB 838 (1967), the Board reversed the Trial Examiner and granted a make-whole remedy following its determination that the employer violated Section 8(a)(5) of the Act. The employer incorrectly believed after executing a first collective bargaining agreement with the Carpenters Union that four employees already covered by a different local union collective bargaining agreement were no longer covered by the original contract. As a result, the employer ceased applying the terms of the original collective bargaining agreement and its successor agreements, and began applying the Carpenters Union collective bargaining agreement to those four workers. The employer knowingly repudiated the original contract for the four workers when it applied the Carpenters Union contract and the four employees failed to receive any of the bargained-for benefits under the original local union's collective bargaining agreement. That did not occur here, as the Local 27 unit members continued receiving the benefits under the contract (except the arbitration provision). Reliance on *B-Y Mfg., Inc.* is inappropriate.
- In *Quality Color Graphics*, 330 NLRB No. 173 (2000), the Board fashioned a make-whole remedy following the employer's repudiation of the collective bargaining agreement that included the employer ceasing to: (i) deduct and remit the union dues, (ii) make the required monthly contributions to the Pension Funds, and (iii) provide and maintain health and dental insurance benefits. The facts in *Quality Color Graphics* justify a make-whole remedy; however, the facts are vastly different from the instant case. Cascades never ceased deducting dues and never ceased providing any monetary benefits under the contract such as health insurance.

- In *Washington Stair and Iron Works*, 285 NLRB 566 (1987), the employer unilaterally implemented a wage increase and withdrew recognition from the union. As correctly acknowledged by the ALJ in the instant case, there is neither evidence nor an allegation in the Complaint that Cascades made unlawful unilateral changes to terms and conditions of employment. The lack of any unilateral changes by Cascades sets the facts here apart from what occurred in *Washington Stair and Iron Works*. The GC's reliance on *Washington Stair and Iron Works* to justify the need for a make-whole remedy is off base.
- In *Perry Steel Co.*, 314 NLRB No. 14 (1994), the employer ceased contributing to fringe benefit funds as required by the contract when it repudiated the contract. Cascades took no such action to negatively affect the monetary benefits of bargaining unit employees and as such, reliance on *Perry Steel Co.* for the proposition that a make-whole remedy is necessary here is misplaced.
- In *Industrial Experimental and Manufacturing Co.*, 332 NLRB No. 76 (2000), the employer took several actions when it repudiated the contract that justified a make-whole remedy. Specifically the employer refused or failed to: (i) pay wages and accrued vacation benefits, (ii) make payments into the employee health insurance plan, 401(k) plan and pension plan, (iii) remit money deducted from unit employees' earnings into savings and investment plans and credit union accounts, and (iv) remit to the union dues checked off from employees' pay. Other than placing dues money in an interest bearing escrow account, which in no way harms bargaining unit members, Cascades never took any of the actions that occurred in *Industrial*. Relying on *Industrial* to justify the need for a make-whole remedy is disingenuous as the facts here are remarkably different from those set forth in *Industrial*.

CONCLUSION

For all of the reasons detailed herein, a make-whole remedy is entirely inappropriate and unnecessary under the circumstances. The Board should deny the GC's Cross-Exceptions to the Decision of the ALJ in their entirety.

Dated: February 19, 2019

Respectfully submitted,

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By: 

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

CASCADES CONTAINERBOARD PACKAGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

and

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GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2019, I served a true copy of **RESPONDENT CASCADES CONTAINERBOARD PACAKGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** *via* the National Labor Relations Board's electronic filing service and via electronic mail on:

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